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Notes and Comments

Federal Usury Law for Service Members: The Talent-Nelson Amendment

I. INTRODUCTION

Imagine a nation currently involved in armed conflicts in two foreign countries. Now picture that nation having to revoke the security clearances of and possibly discharge active members of the armed forces because of their individual financial difficulties that, if not caused by, can be exacerbated by predatory lenders and other abusive credit products.¹ This is the problem Congress intended to address by enacting the Talent-Nelson Amendment² (Amendment) in October of 2006.³

However, as enacted, the well-intentioned Amendment's broad language had the potential to not only protect service members from predatory lenders and abusive credit products, but also to adversely affect the availability and cost of beneficial credit products currently available to service members.⁴ Fortunately, the Department of Defense (DOD), which was given regulatory

1. *See infra* notes 28-38 and accompanying text.

2. Talent-Nelson Amendment, 10 U.S.C.A § 987 (West 2000 & Supp. 2007).

3. *See generally* DEPARTMENT OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS, Aug. 9, 2006 [hereinafter DOD's REPORT] (discussing the affects of predatory lending on service members and their dependents); *see also* Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,584 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

4. *See generally* Letter from Wayne A. Abernathy, Executive Dir., Fin. Insts. Policy and Regulatory Affairs, Am. Bankers Ass'n, Joseph Belew, President and Chief Emp. Officer, Consumer Bankers Ass'n, Andrew M. Egeland, Jr., Major Gen., USAF (Ret.), President and Chief Emp. Officer, Ass'n of Mil. Banks of Am., Camden R. Fine, President and Chief Emp. Officer, Indep. Cmty. Bankers of Am., Diane Casey-Landry, President and Chief Emp. Officer, Am.'s Cmty. Bankers to David S.C. Chu, Under Secretary of Def. for Personnel and Readiness (Jan. 5, 2007) [hereinafter RECENT DEVELOPMENTS IN BANKING LAW], <http://www.abanet.org/buslaw/newsletter/0058/materials/pp5.pdf> (discussing concerns over the Amendment's broad language and the potentially negative side affects the Amendment could have on both consumers and the banking industry).

authority under the Amendment,⁵ has largely listened to the concerns of the banking industry and has promulgated its subsequent regulations implementing the Amendment in such a way as to mitigate, if not totally avoid, these unintended negative consequences.⁶

Part II of this Note examines predatory lending and the military as well as explain the need for the Amendment.⁷ Part III examines the Amendment as enacted, the potential for unintended negative consequences that arose due to the Amendment's broad language, and the DOD's subsequent regulations.⁸ Part IV discusses the implications of not providing an exemption from coverage for depository institutions and shows how the DOD's approach has stayed true to the spirit of the Amendment, provided maximum protection for service members, and maintained the flexibility needed to modify the regulations as future problems arise.⁹

II. PREDATORY LENDING AND THE MILITARY: THE NEED FOR THE AMENDMENT

According to a recent report by the DOD entitled *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents* (DOD's Report) and several other recent studies, predatory lenders and other providers of abusive credit products are targeting military personnel and are geographically concentrating their locations around military bases.¹⁰ The abusive credit products identified in the DOD's

5. 10 U.S.C.A § 987(h) (West 2000 & Supp. 2007).

6. *See infra* notes 58-108 and accompanying text.

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

10. DOD'S REPORT, *supra* note 3, at 10 (stating "payday lending storefront operations outnumber military installment loan companies as much as 137 to 1" and "analysis of statewide statistics show that each of the communities hosting these installations easily rank among the most heavily targeted communities in their states"); *see generally* Stephen M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, Mar. 2005, http://www.law.ufl.edu/faculty/publications/pdf/peterson_military.pdf (finding that in 19 of 20 states studied, payday lenders were located in counties and ZIP codes adjacent to military bases in significantly greater numbers and densities than other areas of the states); *see also* Karen Jowers & Gordon

Report include payday loans, automobile title loans, installment loans, tax refund anticipation loans, and rent-to-own contracts.¹¹

A. *The Unique Problem of Payday Lending and the Targeting of Service Members*

Payday loans are defined in the DOD's Report as low value loans secured by the borrower's personal check or by an agreement to electronically withdraw payment from the borrower's bank account.¹² Payday loans average a couple of hundred dollars in amount, are due in full on the borrower's next payday, and are accompanied by annual percentage rates (APRs) ranging anywhere from a couple of hundred to eight-hundred percent (800%).¹³ Due to its profitability, the payday loan industry has experienced fast growth in the last ten years, both in the number of stores and in the volume of business it handles.¹⁴ In fact, the number of payday loan institutions almost tripled in a seven-year period between 1999 and 2006.¹⁵

Trowbridge, *Payday Predators: High-Interest Lenders Wield Influence with Politicians and Service Members Pay the Price*, ARMY TIMES, May 2, 2005; but see Letter from Jim J. Tozzi, Member of Bd. of Advisors, Center for Regulatory Effectiveness to David S.C. Chu, Under Sec'y for Pers. and Readiness and Chief Human Capital Officer (Sept. 21, 2006), http://www.defenselink.mil/pubs/InfoQual_docs/DOD%20DQA%20Petition.pdf (discussing concerns over the validity of the resources and research methodology used by the DOD in coming to the conclusions included in their report); Letter from Brenda S. Farrell, Dir., Def. Capabilities Mgmt. to Tim Johnson, Chairman, Subcomm. on Fin. Insts. (Aug. 31, 2007) [hereinafter *GAO's Report*] <http://www.gao.gov/new.items/d071148r.pdf> (discussing concerns over the validity of the resources and research methodology used by the DOD in coming to the conclusions included in their report).

11. See DOD'S REPORT, *supra* note 3, at 10-20.

12. *Id.* at 10-14; Jowers & Trowbridge, *supra* note 10 (describing the loan process as "simple: the borrower applies for a cash loan, usually of a few hundred dollars. The borrower hands over a postdated check . . . the check repays the principle, plus interest and fees, which can add up to [APRs] of 200 percent, 400 percent or more").

13. DOD'S REPORT, *supra* note 3, at 10, 16 (stating "[a] 2004 survey of Internet payday lending found that finance charges range from \$25 (650% APR) to \$30 (780% APR) per \$100 borrowed for two-week terms with loans ranging from \$200 to \$2,500").

14. *Id.* at 11 (noting that payday lending was a 40 billion dollar industry in 2005); see also Jowers & Trowbridge, *supra* note 10.

15. Rick Maze, *Pentagon Advises Cap on Loan Interest Rates; Provision to Protect Troops Under Dispute in Congress*, ARMY TIMES, Aug. 28, 2006, at 27 (stating that in 2006 there were roughly 23,000 payday loan institutions operating in the United States).

Payday loans are especially risky for service members because they all potentially involve a “bad” check.¹⁶ Under the Uniform Code of Military Justice, service members are penalized – they can be court-martialed – anytime they deliberately write a check that is not properly covered by funds on deposit.¹⁷ To avoid these penalties, military borrowers take out more loans or continuously renew loans in order to keep the check used as security for the original loan from bouncing.¹⁸ Thus, service members may not have any more reason than their civilian counterparts to take out a payday loan, but they do have an added incentive to remain in what can amount to a debt trap.¹⁹ This also helps explain why payday lenders target service members. Payday lenders rely on the profit earned from repeat borrowers and “ninety-one percent (91%) of payday loans go to borrowers with five (5) or more loan transactions per year.”²⁰

Moreover, service members generally possess several characteristics that make them ideal targets for predatory lenders: (1) they are young and inexperienced in financial matters; (2) they lack adequate savings to survive an unforeseen financial crisis; (3) they are often receiving a regular paycheck for the first time in their lives; (4) they have a relatively high level of job security; and (5) the military emphasizes financial responsibility.²¹

As a result of these characteristics, predatory lenders, and the payday lending industry in particular, have not only physically located their facilities near military bases,²² but have also used the

16. DOD’S REPORT, *supra* note 3, at 14.

17. UNIFORM CODE OF MILITARY JUSTICE: MAKING, DRAWING, OR UTTERING CHECK, DRAFT, OR ORDER WITHOUT SUFFICIENT FUNDS, 10 U.S.C.A. § 923(A), ART. 123(A) (West 2000 & Supp. 2007) (providing that any person, subject to that chapter, who writes a bad check knowing that he or she does not have sufficient funds on deposit to cover it shall be punished as “a court-martial may direct”); *see also* DOD’S REPORT, *supra* note 3, at 14.

18. DOD’S REPORT, *supra* note 3, at 14.

19. Jim Cole, *New California Panel Chief Has Payday Lending in Sights*, AM. BANKER, Jan. 29, 2007, at 2 (quoting Banking Committee Chairman, California Assemblyman Lieu, “[t]here is a hammer over military folks: [i]f they don’t pay their debt they can be court-martialed”); *see also* Jowers & Trowbridge, *supra* note 10 (stating “military members are continually counseled on their responsibilities, which include paying debts on time . . . we are victims of our own success”).

20. DOD’S REPORT, *supra* note 3, at 15.

21. *Id.* at 10; *see also* Jowers & Trowbridge, *supra* note 10.

22. *See* DOD’S REPORT, *supra* note 3, at 11; *see also* Jowers & Trowbridge, *supra*

Internet and affinity marketing techniques to target service members.²³ For example, “an online search for ‘military loans’ gets over thirty-eight million hits on Google, while ‘military payday loan’ fills over three million pages.”²⁴ Furthermore, military loan sites often appear to be educational, use military names, display official looking seals, and ask for military documents to use as a basis for making their loans.²⁵ As a result, even a service member stationed in a state that has sought to protect their citizens from predatory lending has access to payday loans via the Internet.²⁶

Recent research suggests that the payday loan industry’s marketing techniques are working. A September 2005 analysis of the payday lending industry by the Center for Responsible Lending, using the payday loan industry’s own data, shows that “military personnel are three times more likely than civilians to have taken out a payday loan . . . one in five active-duty service members were payday borrowers, and . . . predatory payday lending costs military families over \$80 million in abusive fees every year.”²⁷

note 10 (providing an illustration: “in Lakewood, Wash., home to McChord Air Force Base and Fort Lewis, the number of lenders per 100,000 residents is more than four times as high as for the rest of the state”).

23. DOD’S REPORT, *supra* note 3, at 15; *see also* Jowers & Trowbridge, *supra* note 10 (stating “on the Internet, payday lenders such as Military Financial and Armed Forces Loans specifically target service members. They also advertise in the Military Times newspapers”).

24. DOD’S REPORT, *supra* note 3, at 15-16.

25. *Id.* at 16.

26. *Id.* at 6 (noting that eleven states have attempted to protect their citizens from predatory lending through strong usury laws, but that the other thirty-nine states have legalized payday lending in ways that do not effectively stop predatory practices); *see also* Scott A. Hefner, Note, *Payday Lending in North Carolina: Now You See It, Now You Don’t*, 11 N.C. BANKING INST. 263 (2007) (discussing the exportation of out-of-state interest rates to North Carolina borrowers and North Carolina’s regulatory response); *see generally* Andrew Schaaf, Note, *From Checks to Cash: The Regulation of the Payday Lending Industry*, 5 N.C. BANKING INST. 339 (2001) (discussing federal and state regulation of payday lending).

27. DOD’S REPORT, *supra* note 3, at 12 (defining abusive fees as those fees charged to borrowers caught in a “debt trap” or who have taken out five (5) or more payday loans in one year).

B. The Consequences of Predatory Lending on the Armed Forces

One consequence of predatory lending on members of the armed forces is that military relief societies and other charitable organizations, which attempt to help military personnel financially recover from the effects of abusive credit products, are drained of valuable financial assets that could be used for other beneficial purposes.²⁸

More importantly, however, predatory lending can contribute to financial problems that can undermine troop readiness.²⁹ Service members with financial problems face serious consequences, including, but not limited to, the removal of security clearances, criminal and non-criminal sanctions, and adverse personnel actions including potentially losing their jobs.³⁰

For example, due to the fear that financial problems will distract service members from their duties or increase their vulnerability to bribery and treason, financial issues account for the greatest number of security clearance revocations and denials in the Navy.³¹ Service members' security clearances are revoked when their "debt payments amount to 30 percent to 40 percent of their salary . . . depend[ing] on the military branch."³² Thus,

28. See *Consumer Protection: Hearing Before California State S. J. Assem. Sunset Review*, 195th Cong. (2006) (statement by Capt. Mark D. Patton, USN Commanding Officer, Naval Base Point Loma, C.A., Head, Task Force Predatory Lending (Southwest)), available at <http://www.responsiblelending.org/pdfs/Testimony-CA-CaptPatton-0506.pdf>.

29. DOD's REPORT, *supra* note 3, at 45 (stating "[l]oans at 400% and up that are secured by personal checks written without funds on deposit [payday loans] . . . and other forms of harmful lending undermine troop readiness, morale, and quality of life"); GAO's Report, *supra* note 10, at 1 (stating "serious financial problems can adversely affect unit morale and readiness as well as [service members'] credit histories and military careers").

30. GAO's Report, *supra* note 10, at 1.

31. DOD's REPORT, *supra* note 3, at 45; Patton, *supra* note 28 (stating that "between 2000 and 2005, revoked or denied security clearances for Sailors and Marines due to financial problems have increased 1600 percent [1600%]"); *Debt Holds U.S. Troops Back From Overseas Duty: Thousands Are So Mired They're Considered at Risk for Bribery, Espionage*, THE ASSOCIATED PRESS (San Diego), Oct. 20, 2006 [hereinafter *Debt Holds U.S. Troops Back From Overseas Duty*] (stating "financial problems can distract personnel from their duties or make them vulnerable to bribery and treason").

32. *Debt Holds U.S. Troops Back From Overseas Duty*, *supra* note 31.

otherwise capable service members are being denied the ability to fully carry out their jobs because of their financial situation that can be aggravated by predatory lending and other abusive credit practices.³³

Overall, the number of security clearance revocations has risen in recent years, increasing by roughly 900% in the three year period between 2002 and 2005.³⁴ In total, “6,300 troops in the three branches lost their clearances [between 2002 and 2005].”³⁵ Even though this is only a small percentage of the nearly 900,000 people serving in the armed forces,³⁶ predatory lending and other abusive credit products are increasingly affecting the availability of financial resources and readiness of the armed forces.³⁷ The DOD found this unacceptable and, as a result, Congress attempted to fix the problem.³⁸

III. THE TALENT-NELSON AMENDMENT AS ENACTED, THE POTENTIAL FOR NEGATIVE CONSEQUENCES, AND THE DOD’S REGULATIONS

A. *The Amendment as Enacted and Potential Concerns*

In October 2006, section 670 of The John Warner National Defense Authorization Act for Fiscal Year 2007, Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, otherwise known as the Talent-Nelson Amendment,

33. DOD’S REPORT, *supra* note 3, at 39 (stating “high interest loans,” in any form “can leave a [s]ervice member with enormous debt, difficulty maintaining personal readiness and a tarnished career”); *see also* Patton, *supra* note 28.

34. *Debt Holds U.S. Troops Back From Overseas Duty*, *supra* note 31 (stating “[d]ata supplied to the AP by the Navy, Marines, and Air Force show that the number of clearances revoked for financial reasons rose every year between 2002 and 2005, climbing ninefold from 284 at the start of the period to 2,654 last year [2005]”).

35. *Debt Holds U.S. Troops Back From Overseas Duty*, *supra* note 31.

36. *Id.*

37. *See* DOD’S REPORT, *supra* note 3, at 39; *see also* Patton, *supra* note 28.

38. *See* Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,580 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232) (stating “financial protections are an important part of fulfilling the [DOD’s] compact with Service members and their families”); *see also* GAO’s Report, *supra* note 10, at 1 (stating “Congress and DOD officials have expressed concerns about [service members’] financial conditions”).

was enacted.³⁹ The Amendment has three important provisions: (1) it expressly caps the interest rate a creditor who extends consumer credit to a covered member or a dependent of a covered member⁴⁰ can charge at an APR of interest no greater than thirty-six percent (36%);⁴¹ (2) it increases the disclosure requirements for creditors who extend credit to service members;⁴² and (3) it expressly preempts any inconsistent federal and state laws, rules, and regulations, unless the inconsistent law, rule, or regulation provides more protection for the borrower.⁴³ Further, any creditor who “knowingly” violates the provisions of the Amendment faces both civil and criminal penalties, and if an extension of credit violates any provision of the Amendment it is void from inception.⁴⁴

The Amendment, in its original form, also made it unlawful for any creditor to extend consumer credit to a covered member or

39. Talent-Nelson Amendment, 10 U.S.C.A § 987 (West 2000 & Supp. 2007).

40. 10 U.S.C.A § 987(i)(1)-(2) (defining covered member as “a member of the armed forces who is [either] (A) on active duty under a call or order that does not specify a period of 30 days or less; or (B) on active Guard and Reserve Duty” and a dependent of a covered member as “(A) the member’s spouse; (B) the member’s child (as defined in section 101(4) of title 38); or an individual for whom the member provided more than one-half of the individual’s support for 180 days immediately preceding an extension of consumer credit covered by this section”).

41. 10 U.S.C.A § 987(b). It is important to note that the Amendment’s definition of interest is broader than the one usually used to calculate APR under the Truth in Lending Act. See RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 19-20 (stating the definition of interest under the Amendment is broader than the definition usually given to interest and used to calculate APR under the TILA and in effect creates a sort of “all-in” APR).

42. 10 U.S.C.A. § 987(c)(1)(A)-(C); Donald C. Lampe & Gregg P. Skall, *New law Would Place Federal Usury Limitation on Loans to Servicemembers*, Oct. 10, 2006, <http://www.wcsr.com/default.asp?id=114&bioID=235&objId=207> (stating the Amendment requires that at a minimum the creditor disclose, both orally and in writing prior to the issuance of any consumer credit: “the APR of interest to be charged; all information required under the Truth in Lending Act [TILA]; and the payment obligations of the service member or the service member’s dependent”).

43. 10 U.S.C.A. § 987(d)(1)-(2); see also Jowers & Trowbridge, *supra* note 10 (suggesting this high level of preemption authority may have been necessary due to the fact creditors have historically been able to “[skirt] state rules [protecting borrowers] by taking advantage of looser federal regulations”). There is one express exception to this preemption authority; nothing in the Amendment should be construed as affecting any provision of the Servicemembers Civil Relief Act, 50 U.S.C. App. 527 (2000). See 10 U.S.C.A. § 987(g).

44. 10 U.S.C.A § 987(f)(1)-(4); Stacey Kaper, *Lobbyists Face Hard Task on Military APR Provision*, AM. BANKER, Oct. 20, 2006, at 4 (stating “violations could lead to criminal penalties, fines, and up to a year in jail”).

dependent of a covered member which: (1) refinances, in any form, any consumer credit extended to the borrower with the same creditor who originally extended the credit to the covered borrower; (2) requires the borrower to waive his or her right to legal recourse under any applicable state or federal law; (3) mandates that the borrower submit to arbitration or imposes “onerous” legal notice requirements in the case of a dispute; (4) forces the borrower to give the creditor “unreasonable” notice as a condition for legal action; (5) allows the creditor to use a check, provide access to any of the borrower’s financial accounts, or the title of a vehicle as security for an obligation; (6) requires that the borrower establish an allotment to repay an obligation; or (7) prohibits or charges the borrower a fee for prepaying all or a portion of the loan.⁴⁵

Lastly, the Amendment gave the Secretary of Defense (Secretary) the authority to promulgate regulations establishing: (1) the specific disclosure requirements; (2) the method for calculating a new APR (named the military annual percentage rate (MAPR)) used for measuring compliance with the thirty-six percent (36%) rate cap; (3) the maximum allowable fees that can be charged to a service member or their dependents; (4) definitions for key terms including “consumer credit” and “creditor;” and (5) any other limitations the Secretary felt were appropriate.⁴⁶ Because the Secretary was given the power to define “consumer credit” and “creditor,” the Secretary’s regulations have the power to determine the scope of application and how broadly or narrowly the Amendment will apply and, thus, how many of the unintended consequences discussed below⁴⁷ will be avoided.⁴⁸

While the Amendment was heralded by consumer advocates as a remarkable step in the right direction for consumer

45. 10 U.S.C.A. § 987(e)(1)-(7).

46. 10 U.S.C.A. § 987(h)(2)(A)-(E).

47. See *infra* notes 49-108 and accompanying text.

48. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,584 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232); see Kaper, *supra* note 44 (quoting Floyd Stoner, the head lobbyist for the American Bankers Association: “[w]e are going to be working with all parties involved to ensure that this legally doesn’t have the many unintended consequences that it has now, and a lot of that depends on how it is implemented”).

protection,⁴⁹ banking officials and other creditors almost immediately recognized a number of problems that could arise as a result of the Amendment.⁵⁰ Most importantly for purposes of this Note, they believed that a broad application of the Amendment could harm service members and their dependents by limiting the availability of beneficial credit products and by increasing their credit costs.⁵¹

Given the severe penalties for violations of the Amendment⁵² and the fact that the Amendment creates several burdensome compliance issues for lenders, such as having to comply with two different sets of rules depending on whether the customer is a service member or not,⁵³ one may be skeptical about the banking industry's motives for advocating on the side of the consumer.⁵⁴ However, the banking industry's concern over harsh penalties directly relates to the number and type of beneficial credit products that will be offered by depository institutions in the future.⁵⁵ Given the severity of the penalties, "depository

49. See F. Paul Bland Jr. & Sarah Dean, *Congress Acts Against Predatory Lending, Mandatory Arbitration for Members of the Military and Their Families*, CONSUMER FIN. SERVICES LAW REP. (LRP Publ'ns, Inc., Horsham, P.A.), Feb. 7, 2007, at 15.

50. See RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 7 (discussing the possible problems with the Amendment and suggesting many of the potential problems could have resulted from the fact that the Amendment was significantly expanded from its original form in conference and "there was little public debate, no hearings, and no input from the Congressional committees with jurisdiction over financial products, the banking industry, or banking regulators"); see also GAO's Report, *supra* note 10, at 4.

51. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 1-4 (listing "student loans; credit cards; personal unsecured loans; mortgage refinancing; loans secured by 401(k) plans; loans secured by insurance policies; work-out loans; overdraft lines of credit; and margin loans" as beneficial credit products that service members could potentially be deprived of); see also Joe Adler, *Making a Case to the Pentagon; Five Trade Groups Prep Military Lending Input*, AM. BANKER, Jan. 8, 2007, at 1.

52. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 3 (stating "the importance of a narrowly applied regulation that clearly targets payday lending is critical, as underscored by the severe penalties for violations. These include potential imprisonment and voidance of the contract from inception, [penalties] which rarely if ever are present in consumer protection banking laws").

53. See Kaper, *supra* note 44.

54. See James R. Wells Jr., Letter to the Editor, *Pentagon's Rate Cap Should Be Universal*, AM. BANKER, Jan. 26, 2007, at 11 (suggesting that "if the [DOD] accepts the suggestions [of the banking industry], it will substantially improve the financial industry's position over military personnel, rather than the other way around").

55. See RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 3; see also

institutions will be excessively cautious to avoid any possibility of infringing [upon] the regulation[s].”⁵⁶ As a result, depository institutions could stop providing any beneficial credit product that has the potential to fall under the scope of the Amendment and the DOD’s subsequent regulations.⁵⁷

B. Specific Concerns and the DOD’s Regulatory Response

The DOD released its proposed rule on April 11, 2007, suggesting regulations that addressed or attempted to address many of the concerns relating to the Amendment’s application and requesting comments from both consumer and credit industry advocates as to those proposed regulations.⁵⁸ After receiving numerous comments and working closely with both sides, the DOD released its final rule on August 31, 2007, with the regulations taking effect on October 1, 2007.⁵⁹

Part 1 of this subsection will discuss the DOD’s regulatory definition of “creditor” and the issue of whether or not insured depository institutions should be exempt from the Amendment’s requirements.⁶⁰ Part 2 will discuss the definition of “consumer credit” and the DOD’s adoption of a functional regulatory approach.⁶¹ Part 3 will discuss the new military percentage rate (MAPR) created by the Amendment and defined by the DOD.⁶² Part 4 will examine the Amendment’s heightened disclosure requirements.⁶³ Part 5 will discuss the identification of covered borrowers.⁶⁴

Letter from Wayne A. Abernathy, Executive Dir., Fin. Insts. Policy and Regulatory Affairs to David S.C. Chu, Under Secretary of Defense for Personnel and Readiness (Jan. 23, 2007), <http://www.abanet.org/buslaw/newsletter/0058/materials/pp5.pdf>.

56. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 3.

57. See Letter from Wayne A. Abernathy, *supra* note 55.

58. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 18,157 (proposed Apr. 11, 2007) (to be codified at 32 C.F.R. pt. 232).

59. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

60. See *infra* Part III.B.1.

61. See *infra* Part III.B.2.

62. See *infra* Part III.B.3.

63. See *infra* Part III.B.4.

64. See *infra* Part III.B.5.

1. The Definition of “Creditor” and the Issue of Exemption

Although the banking industry initially believed the best way to prevent the potentially negative side effects of the Amendment was to limit the definition of consumer credit, the American Bankers Association (ABA) later changed its position and began urging the DOD to exempt regulated depository institutions from the Amendment’s definition of “creditor,” in order to allow depository institutions to continue providing their services to service members without significant change.⁶⁵

In support of this proposal, the ABA argued that depository institutions are already heavily regulated and examined frequently.⁶⁶ Further, because the success of depository institutions depends upon their maintenance of a good reputation within the community, depository institutions generally do not and will not offer those products considered abusive by the DOD.⁶⁷ In fact, the DOD’s Report praised several depository institutions for their recent efforts at providing beneficial, short-term, low value credit products to service members and the regulatory agencies in charge of regulating depository institutions have already issued guidelines that, arguably, effectively regulate and deter depository institutions from providing abusive credit products.⁶⁸

65. Letter from Wayne A. Abernathy, *supra* note 55; *see also* Letter from Wayne A. Abernathy, Executive Dir., Fin. Insts. Policy and Regulatory Affairs, Am. Bankers Ass’n, Andrew M. Egeland, Jr., Major Gen., USAF (Ret.), President and Chief Emp. Officer, Ass’n of Mil. Banks of Am., Patricia A. Milon, Chief Legal Officer and Senior Vice President, Regulatory Affairs, Am.’s Comty. Bankers, Marcia Z. Sullivan, Dir. of Gov’t Relations, Consumer Bankers Ass’n, Karen M. Thomas, Executive Vice President, Dir., Gov’t Relations Group, Indep. Cmty. Bankers of Am., Richard M. Whiting, Executive Dir. and Gen. Counsel, Fin. Servs. Roundtable to Fed. Docket Mgmt. Sys. Office (June 11, 2007), at 1-2 [hereinafter *Trade Associations June 11th Comment Letter*], <http://www.icba.org/files/ICBASites/PDFs/jointletter061107.pdf>.

66. *Trade Associations June 11th Comment Letter*, *supra* note 65, at 4-5 (stating “[t]he longest any bank or savings association [as opposed to other non-depository lenders] goes without being examined is 18 months”).

67. *See* Letter from Wayne A. Abernathy, *supra* note 55; *see also* *Trade Associations June 11th Comment Letter*, *supra* note 65, at 2-6; *see also* Adler, *supra* note 51.

68. DOD’S REPORT, *supra* note 3, at 45 (stating “banks and credit unions on-base and near bases offer numerous better alternatives [in comparison to abusive lending products] to [s]ervice members”); *see also* Letter from Wayne A. Abernathy, *supra* note 55.

In sum, the ABA suggested that Congress intended the Amendment to focus on non-depository lenders, such as payday lenders, that are not subject to the consumer protection laws and supervisory oversight within which depository institutions operate.⁶⁹ Therefore, the ABA argued that depository institutions, already subject to an effective regulatory regime, should be exempt from coverage under the Amendment.⁷⁰

The ABA's argument relies on the assumption that the intent of Congress was to focus on the payday lending industry and other unregulated forms of credit providers as opposed to regulated depository institutions.⁷¹ However, it does not appear that this was Congress' intent; rather, Congress aimed to protect service members from abusive credit practices, regardless of the provider.⁷² In effect, the Amendment and the subsequent regulations promulgated by the DOD endorse the concept of "functional"⁷³ regulation as opposed to "entity"⁷⁴ regulation.⁷⁵ As a result, the DOD did not offer an exemption for depository institutions.⁷⁶ Instead, "creditor" is simply defined as any "person

69. Letter from Wayne A. Abernathy, *supra* note 55.

70. *Id.*; see also *Trade Associations June 11th Comment Letter*, *supra* note 65, at 2-6.

71. See *supra* notes 69-70 and accompanying text.

72. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,584 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232) (stating "the intent of the statute is clearly to restrict or limit credit practices [as opposed to credit providers] that have a negative impact on [s]ervice members without impeding the availability of credit that is benign or beneficial"); see Wells, *supra* note 54 (arguing the DOD should apply its regulations to all providers, because to do otherwise would "defeat the protective purpose of the restriction").

73. See LISSA L. BROOME & JERRY W. MARKHAM, *REGULATION OF BANK FINANCIAL SERVICE ACTIVITIES: CASES AND MATERIALS* 265-67 (2d ed. 2004) (defining functional regulation as when the same regulatory agency regulates any institution regardless of form that participates in the regulated function or activity).

74. See *id.* (defining entity regulation as when a regulator is assigned a particular entity to regulate regardless of the functions that entity performs).

75. See Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,585 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232) (stating "it is clearly the intent of the statute that the [DOD] define which types of consumer credit transactions shall be covered by the law" and "the [DOD] has exercised this authority by limiting the rule's applicability to creditors that engage in certain types of consumer credit transactions [payday loans, vehicle title loans, and refund anticipation loans]").

76. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,584 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232); Cheyenne Hopkins, *Bankers Say They Can Live with Rule on Military Loans*,

who is engaged in the business of extending consumer credit with respect to the consumer credit transaction[s] covered by this part [payday loans, vehicle title loans, and tax refund anticipation loans].”⁷⁷

2. The Definition of “Consumer Credit”

The banking industry had initially believed the best way to limit or avoid the potentially negative side-effects for service members and their dependents would be to limit the definition of “consumer credit” to payday loans.⁷⁸ In promulgating the final rule, the Secretary largely followed this suggestion and narrowly defined “consumer credit.”

The five types of abusive credit products reviewed in the DOD’s Report, which include (1) payday loans, (2) vehicle title loans, (3) rent-to-own contracts, (4) certain military installment loans, and (5) tax refund anticipation loans, were divided into two categories: (A) those that contribute to a cycle of debt and (B) those that are financially burdensome to military consumers due to high interest rates and fees.⁷⁹ Consistent with Congress’ desire to provide consumer protection while maintaining the availability of beneficial credit products, the regulations focus on credit products that generally have been considered detrimental to military borrowers or those that lead to a cycle of debt.⁸⁰ Thus, payday and vehicle title loans that contribute to a cycle of debt as well as tax

AM. BANKER, Aug. 31, 2007, at 3.

77. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 32 C.F.R. § 232.3(e) (2007).

78. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 2-3 (suggesting a few examples of the potential consequences of failing to apply the definition of “consumer credit” narrowly could include, but would not be limited to: (1) making unavailable to service members loans that provide incentives, such as lower interest rates, in exchange for agreeing to repay the loan through automatic payments from their checking account; (2) removing incentives for service members to open a savings account; (3) preventing service members from refinancing or participating in work out loans with their existing lenders even when prudent and beneficial; and (4) interest rates and fees on loans to service members and their dependents may be unable to be lowered once the account is opened); *see also* Adler, *supra* note 51.

79. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,582 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

80. *Id.*

refund anticipation loans (which generally have been considered detrimental to service members) are included in the definition of “consumer credit.”⁸¹

However, not included in the definition of “consumer credit” are rent-to-own services that provide rental and ownership opportunities that are not considered loans under the Truth in Lending Act (TILA)⁸² and installment loans with “favorable terms” that are not accompanied by interest rates above the thirty-six percent (36%) rate cap.⁸³ Furthermore, residential mortgages, credit secured by qualified retirement accounts, and secured credit transactions used to finance the purchase of personal property are all expressly excluded from the definition of “consumer credit.”⁸⁴ Lastly, the definition of “consumer credit” is specifically limited to “close-end” credit⁸⁵ offered or extended to a covered borrower primarily for personal, family, or household purposes.⁸⁶ Thus, “open-end[ed]” credit products,⁸⁷ such as credit cards, are not included in the definition of “consumer credit” and the regulations will not apply to them.⁸⁸

3. The Military Annual Percentage Rate (MAPR)

Under the DOD’s final rule, a distinctive percentage rate

81. 32 C.F.R. § 232.3(b)(i)-(iii) (2007); *see also* *Pentagon Takes Steps to Avert Predatory Lending*, REUTERS NEWS, Oct. 1, 2007.

82. Regulation Z, Truth in Lending Act, 12 C.F.R. § 226 (2007).

83. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,582 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

84. 32 C.F.R. § 232.3(b)(2)(i)-(v) (2007).

85. 32 C.F.R. § 232.3(a) (2007) (defining “close-end” credit as “consumer credit other than ‘open-end credit’ as that term is defined in Regulation Z (Truth in Lending), 12 CFR part 226”).

86. 32 C.F.R. § 232.3(b) (2007).

87. 12 C.F.R. § 226.2(a)(20) (2007) (defining “open-end” credit as “consumer credit extended by a creditor under a plan in which: (i) the creditor reasonably expects repeated transactions; (ii) the creditor may impose a finance charge from time to time on an outstanding unpaid balance; and (iii) the amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid”).

88. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,587 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232); *see* *Pentagon Takes Steps to Avert Predatory Lending*, *supra* note 81.

called the MAPR—which is separate from the definition of APR provided by TILA—was defined by the Secretary and applies anytime a lender provides one of the credit products included in the definition of “consumer credit” to a “covered borrower.”⁸⁹ The MAPR expressly includes: “(i) interest, fees, credit service charges, credit renewal charges; (ii) credit insurance premiums including charges for single premium credit insurance, fees for debt cancellation or debt suspension agreements; and (iii) fees for credit-related ancillary products sold in connection with and either at or before consummation of the credit transaction.”⁹⁰ These inclusions are intended to prevent creditors who choose to provide the covered credit products from evading the thirty-six percent (36%) rate cap by providing low interest rates, but charging high fees and, thereby, undermining the intended protections of the Amendment.⁹¹

The MAPR does not include, among other things, “fees or charges imposed for actual unanticipated late payments, default, delinquency, or similar occurrence[s].”⁹² These exclusions are based on the fact that such fees are contingent on events that may or may not occur after the issuance of the loan.⁹³ Thus, charges that the lender cannot or should not be able to predict under the normal terms of the lending agreement are not included in the MAPR.⁹⁴

One of the banking industry’s concerns was the potential for consumer confusion regarding the second definition for APR, known as the MAPR.⁹⁵ Specifically, members of the banking

89. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,587 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

90. 32 C.F.R. § 232.3(h)(1)(i)-(iii) (2007); see also *Pentagon Takes Steps to Avert Predatory Lending*, *supra* note 81 (noting that, in other words, “the method for calculating the rate encompasses all fees required at the time of obligation, with very few exceptions”).

91. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,587 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

92. 32 C.F.R. § 232.3(h)(2)(i) (2007).

93. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,587 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

94. *Id.*

95. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 17-20.

community recognized the uncertainty for consumers when confronted with two different definitions and numbers for the same credit product.⁹⁶ To address this concern, the DOD has agreed to take on the responsibility of training service members and covered dependents about the differences between the MAPR and APR as well as their rights as covered borrowers more generally.⁹⁷ Thus, any consumer confusion resulting from the promulgation of the regulations is to be handled by the DOD, not the credit industry.

4. Concerns Relating to the Disclosure Requirements

The banking industry also viewed the disclosure requirements as impractical, especially for products that are “offered by mail, Internet, and telephone rather than in person.”⁹⁸ The DOD’s regulations require that, prior to the conclusion of the transaction, the creditor must disclose: (1) the MAPR along with the total dollar amount of all charges included in the MAPR; (2) any disclosures required by Regulation Z of the TILA;⁹⁹ (3) the payment obligations of the covered borrower; and (4) a prepared statement included in the regulations.¹⁰⁰ The disclosures required by the Secretary’s regulations and those mandated by Regulation

96. *Id.*

97. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,580, 50,581, & 50,589 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232) (discussing the increased financial education efforts undertaken by the Military Services for service members and their families and stating that the difference between the MAPR and APR as well as the other financial rights of service members created by the Amendment will be added to their educational curriculum).

98. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 14-15 (stating that “the compliance problems for depository institutions attempting to make oral disclosures to consumers, even in face-to-face-transactions, are hard to overstate . . . [and will be] a particular burden for service members who require flexible opportunities to access products and services”); *see also* Adler, *supra* note 51 (stating “the law effectively bans phone solicitations to military personnel”); *see also Trade Associations June 11th Comment Letter*, *supra* note 65, at 14-15.

99. *See generally* Regulation Z, Truth in Lending Act, 12 C.F.R. § 226 (2007) (promoting the informed use of consumer credit by requiring certain disclosures relating to the terms and costs of covered credit products).

100. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 32 C.F.R. § 232.6(a)(1)-(4) (2007).

Z must be provided separately.¹⁰¹ Additionally, the Secretary's disclosures have to be performed orally and in writing whereas Regulation Z's disclosures only need to be provided in writing.¹⁰²

In order to meet the banking industry's concerns over transactions conducted through mail or the Internet, the regulations allow the creditor to satisfy the disclosure requirements by providing a "toll-free telephone number on or with the written disclosures that consumers may use to obtain oral disclosures and the creditor provides oral disclosures when the covered borrower contacts the creditor for [that] purpose."¹⁰³

5. Identification of Covered Borrowers

Another concern of the banking industry was who had the duty of identifying and providing proof of eligibility for protection under the Amendment?¹⁰⁴ To address this concern, the DOD's regulations provide a safe harbor for creditors.¹⁰⁵ A "creditor may [but does not have to] require an applicant to sign a statement declaring whether or not he or she is a covered borrower."¹⁰⁶ As long as a creditor does not obtain documentation suggesting that the applicant is a covered borrower, the creditor is free to rely on the applicant's "covered borrower identification statement."¹⁰⁷ Further, creditors may, but are not required, to verify an applicant's covered member status by requesting relevant documentation or by accessing a database made available by the DOD.¹⁰⁸ Therefore, the responsibility of identifying who is a covered borrower, at least initially, lies with the applicant, not the

101. 32 C.F.R. § 232.6(b)(1)-(2) (2007).

102. *Id.*

103. 32 C.F.R. § 232.6(b)(2) (2007).

104. RECENT DEVELOPMENTS IN BANKING LAW, *supra* note 4, at 9-12 (stating "among the most critical and challenging issues to resolve, especially if the provision is not narrowly applied, is a means for lenders to (1) determine, (2) verify, and (3) monitor eligibility for coverage"); see Kaper, *supra* note 44.

105. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,588 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

106. *Id.*

107. *Id.*

108. 32 C.F.R. § 232.5(b)-(c) (2007).

creditor and, when in doubt, the creditor will be able to verify the applicant's status using the DOD's database.

IV. FUTURE IMPLICATIONS OF THE DOD'S REGULATIONS

By limiting the definition of "consumer credit," the Amendment and the DOD's subsequent regulations only apply to creditors who provide those credit products considered abusive by the DOD: payday loans, vehicle title loans, and tax refund anticipation loans.¹⁰⁹ Thus, if financial institutions do not offer those products, or presumably substantively similar products, the Amendment and the DOD's regulations will not apply to them and, therefore, the new regulations should have little to no effect on their business or operations.¹¹⁰

For borderline situations where the credit product is not explicitly covered, but is similar in substance to a covered product or where a financial institution is taking part in one of the exclusions to the limitations of the Amendment provided for in the DOD's regulations,¹¹¹ the test appears to be whether or not the transaction includes "favorable" or detrimental terms.¹¹² While this is a subjective test, the DOD believes it to be suitable because it allows for the protection of service members and their dependents without preventing creditors from providing beneficial credit products or undertaking beneficial credit procedures, such as refinancing when appropriate.¹¹³ Although the DOD did not

109. See Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,585 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

110. *Id.*

111. See 32 C.F.R. § 232.8(a) (2007). Such as the limited exception to the prohibition against creditors extending "consumer credit to a covered borrower in order to roll over, renew or refinance consumer credit that was previously extended by the same creditor to the same borrower." *Id.*; see also Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,589 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

112. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,583 & 50,589 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

113. See *id.* at 50,589; but see *Trade Associations June 11th Comment Letter*, *supra* note 65, at 15-16 (suggesting that because the test is so subjective, depository institutions will simply stop offering borderline products to covered borrowers due to the risk of harsh punishment).

further clarify the definition of “favorable terms,” one obvious guideline is whether or not the credit product is below the thirty-six percent (36%) MAPR cap.¹¹⁴

As mentioned earlier, the DOD’s narrow definition of “consumer credit” was the initial suggestion of banking officials and has generally been supported by the banking industry.¹¹⁵ Although providing an exemption for depository institutions within the definition of creditor may have made application of the Amendment less complex, providing an exemption for any lender, not just depository institutions, would violate the spirit of the Amendment.¹¹⁶ Furthermore, some consumer advocates argue that providing a blanket exemption to depository institutions might invite future violations of the law by those depository institutions that are willing to take advantage of the less stringent guidelines and regulations already in place or subsequently promulgated by the depository institutions individual regulators.¹¹⁷

However, there still remains the potential for some negative consequences for both consumers and members of the depository industry. For example, because of the stiff statutory penalties provided for by the Amendment, the possibility exists that “some bankers will be overly cautious in determining which products are subject to the regulation[s] . . . [or will] conclude that the risks are simply too great to continue offering the products and services currently available to service members.”¹¹⁸ If this occurs, the availability of some credit products, specifically those products covered by the Amendment – payday loans, vehicle title loans, and tax refund anticipation loans as well as substantively similar credit products – could decrease while the cost of others could increase.¹¹⁹

114. 32 C.F.R. § 232.4(b) (2007).

115. *See supra* notes 65 & 78 and accompanying text.

116. *See supra* notes 72-77 and accompanying text.

117. *See* Letter from Jean Ann Fox, Consumer Fed’n of Am., Kathleen Keest, Center for Responsible Lending, Lauren Saunders, Nat’l Consumer Law Center to Dep’t of Def., at 7-11 (Feb. 5, 2007) <http://www.responsiblelending.org/pdfs/MLA-DOD-FINAL-2-5-07-A.pdf>; *see also* Letter from Center for Responsible Lending, Consumer Fed’n of Am., Consumers Union, and Nat’l Ass’n of Consumer Advocates, Nat’l Consumer Law Center to Dep’t of Def., at 4-5 (June 11, 2007) <http://www.responsiblelending.org/pdfs/DoD-Comments-final-6-11-07.pdf>; Wells, *supra* note 54.

118. *Trade Associations June 11th Comment Letter*, *supra* note 65, at 5.

119. *But see* Press Release, North Carolina Office of the Commissioner of Banks,

For the banking industry, even if insured depository institutions do not offer the lending products included in the definition of “consumer credit,” it may only be a matter of time before a creative plaintiff’s lawyer takes advantage of an ambiguity in the regulatory definition of “consumer credit” and forces a depository institution to expend resources on litigating a questionable claim.¹²⁰ However, given that the intent of Congress is to protect service members from those products they consider abusive regardless of the provider, the DOD stayed true to the spirit of the law by placing any future risk of litigation on the shoulders of the creditors who choose to take part in the covered activities.

These potential risks will hopefully be mitigated by the fact the DOD has maintained the ability to review, alter, and issue additional rules in the future, if or when a potentially negative consequence becomes a reality.¹²¹ In order to implement this objective, the DOD has agreed to continue collecting data from all sides and monitor the credit market in order to prevent any uncovered abusive credit practices, impediments to the availability of beneficial credit products, or negative consequences for the credit industry from emerging.¹²²

V. CONCLUSION

While the DOD’s final rule did not provide an exemption

Statement of Commissioner of Banks, Commissioner Joseph A. Smith, Jr. on N.C. Commissioner of Banks and UNC Study Finds Working Families Do Not Miss Payday Lending (Nov. 13, 2007), <http://www.nccob.org/NR/rdonlyres/1D3C8641-B108-4AB9-B9DB-F470B97BCCF5/0/NCCOBpaydaypr.pdf>. The release stated that in North Carolina, a state that has effectively closed down the payday lending industry, “the absence of payday lending has had no significant negative impact on credit availability for North Carolina consumers.” *Id.* Rather, consumers used alternative methods, such as “paying bills late, using savings, borrowing from family and friends, and getting advances on a credit card” to get through a financial emergency that may have caused them to turn to a payday loan in the past. *Id.*

120. See Letter from Wayne A. Abernathy, Executive Dir., Fin. Insts. Policy and Regulatory Affairs to Fed. Docket Mgmt. Sys. Office (June 11, 2007), <http://www.aba.com/NR/rdonlyres/DC65CE12-B1C7-11D4-AB4A00508B95258D/47787/DODLetterTalentAmendment11June.pdf>.

121. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. 50,580, 50,585 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232).

122. *Id.*

for depository institutions, it did leave open the possibility of revisiting the issue in the future.¹²³ However, unless the definition of “consumer credit” changes it does not appear that revisiting the issue will be necessary.¹²⁴ The Secretary’s regulations effectively implement Congressional intent by focusing on certain types of credit products as opposed to certain types of creditors.¹²⁵ Further, because of the narrow definition of “consumer credit,” the Amendment and the DOD’s subsequent regulations will only apply to credit institutions offering the covered products.¹²⁶ Thus, the regulations should provide the greatest amount of protection possible for service members from those products without unnecessarily impeding upon the availability of other credit products.

Many of the banking industry’s concerns were and are valid, but they largely turn on the threat of subjecting depository institutions to additional oversight and harsh penalties.¹²⁷ In response to this fear and the narrow definition of “consumer credit,” the ABA now believes that insured depository institutions “just won’t offer those products, period.”¹²⁸ If this is the case, then the regulations promulgated by the DOD have effectively served their original purpose by protecting service members from those products considered to be abusive. Hopefully, the Amendment and subsequent regulations will also act to encourage lenders to continue developing new and innovative credit products that will satisfy the market for short-term, low value loans in a more mutually beneficial manner.

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123. See Hopkins, *supra* note 76.

124. Limitations on Terms of Consumer Credit Extended to Service Members and Dependents, 72 Fed. Reg. at 50,584 (Aug. 31, 2007) (to be codified at 32 C.F.R. pt. 232); see also *Trade Associations June 11th Comment Letter*, *supra* note 65, at 2 (stating “if the rule were applied more generally or to a broader array of loans, those provisions would represent significant challenges and burdens that would discourage offering many financial products and services beneficial to service members”).

125. See *supra* notes 72-88 and accompanying text.

126. *Id.*

127. See generally *Trade Associations June 11th Comment Letter*, *supra* note 65; also Hopkins, *supra* note 76.

128. Hopkins, *supra* note 76 (quoting Letter from Wayne A. Abernathy, *supra* note 120).